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NO.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT A. GARRETT
Petitioner,

VERSUS

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Feres* doctrine bar a claim under the Federal Tort Claims Act by a former serviceman who was illegally detained in the military?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 625 F.2d 712 (5th Cir. 1980).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the Fifth Circuit Judgment is September 12, 1980, and it was entered on September 15, 1980. There has been no order respecting a rehearing or granting an extension of time within which to petition for certiorari. The statutory provision on which jurisdiction is predicated to review the Judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the following:

(1) 28 U.S.C. § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, meas-

ured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

(2) 10 U.S.C. § 802:

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the Environmental Science Services Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: the Canal Zone,Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

(3) 10 U.S.C. §1168

(a) A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to

him or his next of kin or legal representative.
(b) This section does not prevent the immediate transfer of a member to a Veterans' Administration facility for necessary hospital care.

STATEMENT OF THE CASE

On February 28, 1979, Robert A. Garrett filed a complaint against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Section 2674, wherein he complains that he suffered compensable injuries as a result of the actions of Government employees, namely, Marine Corps personnel. Basically, petitioner claims that he suffered the loss of his freedom and various benefits and entitlements as a result of his being placed wrongfully on "legal hold" and illegally maintained in that status even after false charges against him had been dropped.

On April 17, 1979, the Government moved to dismiss for failure to state a right of action upon which relief can be granted, on the ground that petitioner's action was barred under the *Feres* doctrine. *Feres v. United States,* 340 U.S. 135 (1950).

On August 15, 1979, the District Judge heard oral argument and granted the Government's motion, "except as to claim for illegal detention".

On August 21, 1979, the Government again moved to dismiss, this time for the reason that the Court lacked jurisdiction due to petitioner's alleged failure to file timely an administrative tort claim.

On September 19, 1979, the District Judge heard

oral argument and denied the Government's motion to dismiss, an on October 19, 1979, written reasons were entered. (App. p.9)

On January 2, 1980, the Government filed its third motion to dismiss, asking the District Judge to reconsider his earlier denial of the Government's prior motion based on the *Feres* doctrine.

On January 16, 1980, the District Judge heard oral argument, reversed his earlier decision, and this time granted the Government's motion dismissing plaintiff's illegal detention claim. On January 22, 1980, final judgment was entered. (App. p.15)

Plaintiff appealed the dismissal of his complaint to the United States Court of Appeals, Fifth Circuit, and on September 12, 1980, the Fifth Circuit affirmed the dismissal. (App. p1)

STATEMENT OF FACTS

Under the facts alleged in his complaint, petitioner would show that on May 16, 1974, he applied for re-enlistment in the Marine Corps which was accepted on June 25, 1974, at which time he was given several re-enlistment bonuses and options.

On July 4, 1974, petitioner was involved in a fight with certain Military Police, who alleged that he had assaulted them.

When petitioner's re-enlistment date of July 12, 1974 arrived, he was not allowed to re-enlist but was instead

placed on "legal hold" for approximately four months, until November 15, 1974. Formal charges were not lodged against petitioner until July 25, 1974.

Petitioner would show that he was never brought to trial and the charges against him were dropped as early as October 17, 1974, although he was not notified of this favorable action and was not released from "legal hold" until November 15, 1974.

REASONS FOR GRANTING WRIT

The *Feres* doctrine is a judicial limitation on the Federal Tort Claims Act created by this Court. Any narrowing or broadening of its scope should be established authoritatively by this Court. This case presents an opportunity to clarify an important legal principle that has significant social implications.

Thirty years ago, this Court limited the availability of the FTCA to military personnel when the Court held that the FTCA does not apply to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". *Feres v. United States*, 340 U.S. 135, at 146 (1950)

This case explores the meaning of that doctrine and challenges its applicability where, as here, the military did not have valid jurisdiction over the individual at the time of the wrongdoing. The wrongdoing in question is an illegal detention imposed on petitioner by Marine Corps personnel and in order to see if petitioner's claims are compensable under the FTCA, a review of the *Feres* doctrine is in order.

In *Feres, supra,* this Court actually had three separate lawsuits under consideration, two of which resulted from alleged malpractice by army surgeons, while the third had been brought by the executrix of Rudolph J. Feres who claimed that the young soldier had been killed by the Government's negligence in quartering the decedent in unsafe barracks. As noted, however, by the Court:

> "The common fact underlying the three cases is that each claimant while on active duty and not on furlough sustained injury due to negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong. This is the 'wholly different case' reserved from our decision in *Brooks v. United States,* 337 U.S. 49, 52, 93 L ed 1200, 1203, 69 S.Ct. 918, 25 NCCA NS 1." (304 U.S. 135, at 138)

In *Feres, supra,* we submit, the Court did not consider the issue presently being raised, namely, whether a soldier illegally detained by an armed service is barred from obtaining compensation under the FTCA. To the contrary, the *Feres* decision assumed that the servicemen in question were on valid active duty at the time of the wrongdoing.

In concluding that the Government is not liable under the FTCA for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service,"

(340 U.S. 135, at 146), the Court drew a vital distinction between those cases under consideration and an earlier decision, *Brooks v. United States*, 337 U.S. 49 (1949)

In *Brooks*, the Court allowed the serviceman to recover under the FTCA because he was on "furlough" and, thus, his relationship while on leave was *not* analogous to that of a soldier injured while performing duties under orders.

It is petitioner's position that his facts are stronger than those in *Brooks, supra.* If this Court will not bar the FTCA claim of a soldier on *leave*, it would be anomalous for the Court to bar the FTCA claims of an individual who was in the military only because he was being illegally detained. This crucial distinction was recognized by the District Judge in his initial denial of the Government's motion to dismiss:

> "However, I denied the motion as to the claim for unlawful detention, for if that allegation is true, plaintiff was actually a civilian whom the military refused to discharge for nearly two months. The claim arises out of his military service only in the trivial sense that the detention followed upon a valid period of service." (App. p.9)

In relying on 10 U.S.C. §802 and §1168, the Government has argued that until an individual physicially receives his discharge certificate he is still in active service. Therefore, according to the Government, any cause of action arising prior to the physical delivery of the discharge certificate is barred under *Feres, supra.* The Government's position is

unreasonable and dangerous, and it completely fails in light of well settled military jurisprudence. Absent a valid cause, a member of the military is absolutely entitled to be separated from active duty at the expiration of his enlistment. *United States v. Hout,* 19 U.S.C.M.A. 299, at 301, 41 C.M.R. 299 (1970); *United States v. Simpson,* 1 M.J. 608, at 609 (ACMR 1975).

This doctrine of "right of separation" is embodied in the Marine Corps' own Separation Manual, as follows:

> "The Marine Corps has the right, obligation, and duty to separate from the service, with an appropriately characterized discharge certificate, members who are entitled to or who have earned discharge, and members who clearly demonstrate that they are unqualified for retention. At the same time, such members have rights which shall be protected (App. p.16 , Par. 6001(1))

The Government's reliance on 10 U.S.C. §1168 is misplaced because that statute is *not* authority for the proposition that an armed service may refuse, absent a lawful cause, to deliver a discharge certificate to the individual.

The Government's reliance upon 10 U.S.C. §802 is likewise misplaced because "that provision is designed to permit the Government to accomplish an orderly separation or discharge and not to relieve it from the consequences of its own negligence". *United States v. Simpson,* 1 M.J. 608, at 621 (AMCR 1975). As the jurisprudence indicates, that statute was

never intended to be used as a pretext for detaining an individual in the service *at the pleasure* of the armed force.

In summary, it is petitioner's position that the Government is in error when it argues that even where an individual is held in the military service, *without any valid military authority,* the *Feres* doctrine still applies. It is petitioner's position that before the *Feres* doctrine can apply, it must be established that the period of military service was valid. There is nothing in *Feres, supra,* that requires a contrary principle. The phrase "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," we submit, presupposes a period of *valid* military service.

Where the period of service is valid, there may be good reason to bar a serviceman's FTCA claim in view of the strong policy reasons enunciated in *Feres, supra.* Where, however, as here, the period of service in question is not valid, there would seem to be little or no reason to apply such policy considerations.

CONCLUSION

In view of the above, we pray that this Court grant a writ of certiorari and, in due course, reverse the dismissal of petitioner's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for a Writ of Certiorari have been mailed, with first-class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, this ~~10th~~ 11 day of December, 1980.

ORIGINAL SIGNED
C. ELLIS HENICAN

C. Ellis Henican

A. OPINION OF COURT OF APPEALS, SEPTEMBER 12,1980

ROBERT A. GARRETT,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 80-3091
Summary Calendar.
United States Court of Appeals,
Fifth Circuit
Sept. 12, 1980.

Former marine filed a complaint against the United States pursuant to the Federal Tort Claims Act alleging that he had been illegally and negligently detained in the Marine Corps for two months between expiration of his enlistment and his formal discharge. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., dismissed the complaint, and appeal was taken. The Court of Appeals, Roney, Circuit Judge, held that alleged injury to marine, who had been detained in Marine Corps for two months between expiration of his enlistment and his formal discharge, arose out of activity incident to his military service; thus, his suit was barred by *Feres* doctrine.

Affirmed.

1. Armed Services - - 11

Mere expiration of enlistment does not effect an automatic discharge from armed services.

2. Armed Services - - 11

One who has not been discharged is still a member of armed services on active duty.

3. United States - - 78(16)

Alleged injury to marine, who had been detained in Marine Corps for two months between expiration of his enlistment and his formal discharge, arose out of activity incident to his military service; thus, his suit under Federal Tort Claims Act was barred by *Feres* doctrine. 28 U.S.C.A. § § 2671-2680.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RONEY, KRAVITCH and TATE, Circuit Judges.

RONEY, Circuit Judge:

Robert Garrett filed a complaint against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C.A. § § 2671-2680, alleging that he had been illegally and negligently detained in the United States Marine Corps for two months between the expiration of his enlistment and his formal discharge. He sought compensation for lost benefits, $100,000 damages, attorney's fees and costs. The district court dismissed the complaint on the ground that the Government is not liable under the FTCA for injuries which arise out of or are in the course of activity incident to military service. *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

Briefly, Garrett, a member of the Marine Corps, submitted his request for reenlistment on May 16, 1974. On

July 4, 1974, he was involved in an altercation with members of the Military Police. When he appeared for reenlistment on July 19, Garrett was not allowed to reenlist but instead was placed on legal hold. His prior enlistment contract was extended for an additional two months, until approximately September 19, 1974.

Although formal charges were lodged against Garrett on July 25, he was never tried and the charges against him were dropped on October 17, 1974. Garrett apparently was not then informed that the charges had been dropped and remained on legal hold until November 15, 1974. On that day, he was told that he was no longer on legal hold and had until 1:00 p.m. to reenlist. Garrett chose not to reenlist and was honorably discharged three days later.

In sum, Garrett's enlistment contract expired on September 19, 1974, but he was neither released nor discharged until about two months later.

The FTCA provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.A. § 2674. In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152, however, where the estate of a soldier killed in a barracks fire allegedly caused by Army negligence brought suit against the Government, the Supreme Court interpreted the statute to exclude servicemen from coverage when their claims arise out of or in the course of activity incident to military service.

[1] Garrett claims that *Feres* is not applicable in this case because he was not on valid active duty at the time of the alleged wrongdoing. Plaintiff, still on active duty and subject to military jurisdiction when he was placed on legal hold, overlooks two points. First, although there are no Fifth Circuit cases directly on point, it is well established that the mere expiration of enlistment does not effect an automatic discharge. *Dickenson v. Davis,* 245 F.2d 317 (10th Cir. 1957), cert. denied, 355 U.S. 918, 78 S.Ct. 349, 2 L.Ed.2d 278 (1958); *Roman v. Critz,* 291 F.Supp. 99, 102 (W.D. Tex. 1968). In *Dickenson v. Davis,* the plaintiff, a former prisoner of war, argued that he had regained civilian status and was not subject to military discipline at the time formal charges were lodged against him because his enlistment term had expired and his requested formal discharge had not been granted within a reasonable time after his return to the United States. The Tenth Circuit found his argument ingenious but unsound.

> Service in the military, whether by enlistment or otherwise, creates a status which is not and cannot be severed by breach of contract unfortified by a proper authoritative action. *U.S. v. Grimley,* 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636; see also *Morrissey v. Perry,* 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644; *U.S. v. Williams,* 302 U.S. 46, 58 S.Ct. 81, 82 L.Ed. 39. At the time appellant was accused he had neither been discharged in accordance with 10 U.S. C.A. § 1580 (transferred to 652a for

> future codification) nor had his military status been severed under other authority or by judicial action. He was a soldier, subject to the rules, discipline and jurisdiction of the Army and squarely within the provisions of Article 2 of the Uniform Code of Military Justice.

245 F.2d at 319 (footnote omitted).

[2] Second, one who has not been discharged is still a member of the armed services on active duty. Congress has clearly stated that an individual is not released from active military duty until he has received his discharge papers. "A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty . . . are ready for delivery to him . . ." 10 U.S.C.A. § 1168(a). Further, 10 U.S.C.A. § 802 provides that "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to the Code of Military Justice.

[3] Garrett relies on *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), and *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980), in which servicemen were allowed to recover under the FTCA for injuries which occurred while on furlough from the armed forces. Garrett asserts that if claims are not barred for servicemen on furlough, they should not be barred for servicemen whose enlistments have expired, but who are illegally detained. But in both *Brooks* and *Parker*, the servicemen were injured while on

leave from military duty. Their injuries were in no way related to or sustained as an incident of their military activities, nor did the injuries arise because they were servicemen. In this case, however, plaintiff's injury did arise out of his military service. He was placed on legal hold because of his activities as a marine, and the decision to keep him on hold beyond the expiration of his enlistment contract and after formal military charges against him were dropped, whether or not negligently made, was also incident to his activities as a marine. Since plaintiff's alleged injury arose out of activity incident to his military service, we hold that his suit under the FTCA is barred by the *Feres* doctrine.

The extended discussions of the *Feres* doctrine in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), and *Parker v. United States,* 611 F.2d 1007, make it unnecessary to elaborate further here.

The First Circuit has recently reached the same result in a similar case. *Torres v. United States,* 621 F.2d 30 (1st Cir. 1980). The plaintiff there alleged that due to Army negligence his discharge was erroneously classified as "under other than honorable conditions," when he in fact was entitled to and later received an honorable discharge. Holding the *Feres* doctrine barred the action, the court held that plaintiff's injuries arose out of or in the course of activity incident to his service. It noted that

> discharge is incident to every soldier's military service and constitutes the final step in his active relationship with the Army. The discharge process itself is conducted by military personnel in the course of their military duties and involves an evaluation of the soldier's service and a classification of his status according to factors which are peculiar to the military nature of the relationship between the soldier and the government. . .[T]o allow soldiers to maintain actions arising under state law for injuries allegedly stemming from discharges with which they take issue would be inconsistent with Feres, which rested in substantial part upon a finding that the "distinctly federal" character of the military relationship makes inappropriate the countenancing of FTCA actions based on injuries arising out of that relationship. 340 U.S. at 145 [71 S.Ct. at 159]; *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671 [97 S.Ct. 2054, 2057, 52 L.Ed.2d 665] (1977).

Torres v. United States, 621 F.2d at 32. The court's reasoning is equally applicable to a case where the Army fails to release or discharge a soldier upon the expiration of his enlistment contract. In each case, the claim is for injuries which arise out of the military relationship.

This does not suggest that a soldier is foreclosed from legal relief if held in the military after he has met all of

the requirements for discharge. See *Howe v. Laird*, 456 F.2d 233 (5th Cir. 1972); *Helwick v. Laird*, 438 F.2d 959 (5th Cir. 1971). He may not, however, sue the United States for damages in tort for such action under the Federal Tort Claims Act.

In light of our disposition of the case under the *Feres* doctrine, we do not reach the Government's argument that dismissal is required for failure to timely file an administrative appeal pursuant to 28 U.S.C.A. § 2401(b).

AFFIRMED.

B. WRITTEN REASONS OF DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT A. GARRETT	CIVIL ACTION
VERSUS	NO. 79-781
UNITED STATES OF AMERICA	SECTION G

This is a lawsuit brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, et seq., based upon allegedly tortious acts committed by the United States Marine Corps against the plaintiff, Robert A. Garrett. On September 19, 1979 the government moved to dismiss the complaint on the ground that plaintiff had filed his administrative claim with the Corps after the two year peremptive period of 28 U.S.C. § 2401 had expired.[1] At that time I denied the motion. I now enter my reasons.

Although not actually divided into separate counts, the complaint appears to set forth two separate causes of action.

---

1. 28.U.S.C. § 2401 provides in relevant part:

> "(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . ."

On May 16, 1974 plaintiff, then a member of the Marine Corps, applied for re-enlistment, as his tour of duty was scheduled to end on July 21, 1974. Re-enlistment was approved on June 25, 1974, at which time plaintiff was given several re-enlistment options. On July 4th, eight days before the date set for re-enlistment, he became involved in a fight with some Military Police, who alleged that he had assaulted them. When plaintiff's re-enlistment date of July 12th arrived, he was not allowed to re-enlist but was instead placed on "legal hold" for approximately two months, until September 19, 1974.

Formal charges were lodged against plaintiff on July 25, 1974, and he was referred for trial by Special Court Martial. Despite the referral of charges he was never tried, although he was kept on legal hold until November 15th. On that morning he was told that he had until 1:00 p.m. to decide whether to re-enlist, and he was also informed that the re-enlistment options previously given him were no longer available. He decided not to re-enlist and as a result was granted an honorable discharge three days later. Now plaintiff asserts that the Corps' treatment of him is actionable because he was denied re-enlistment bonuses and benefits without cause and was illegally maintained on hold from September 19, 1974 until November 15, 1974.

In spite of this allegedly tortious treatment, plaintiff re-enlisted on February 15, 1975. He states that he was promised a promotion to Staff Sergeant as well as certain other benefits, but he failed to receive either the promotion or

the benefits. On July 25, 1975, he therefore resigned from the Corps and was given a General Discharge under Honorable Conditions, which was upgraded in 1977 to Honorable. He claims that the Corps' failure to grant him a promotion and benefits as promised during this second tour of duty is also actionable.

On August 15, 1979 the government moved to dismiss the complaint on the strength of *Feres v. United States*, 340 U.S. 135 (1950), which held that the FTCA does not apply to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. I granted that motion in part, dismissing all claims for lost promotions and benefits. However, I denied the motion as to the claim for unlawful detention, for if that allegation is true, plaintiff was actually a civilian whom the military refused to discharge for nearly two months. The claim arises out of his military service only in the trivial sense that the detention followed upon a valid period of service.

Subsequently, on September 19,1979, the government moved to dismiss the remaining claim because the plaintiff failed to file an administrative complaint with the Marine Corps until April 6, 1977, more than two years after the last date of detention. Since 28 U.S.C. § 2401 requires an administrative complaint to be filed with the appropriate agency within two years of the allegedly tortious act, the government argues that plaintiff's suit must be dismissed for lack of jurisdiction. Plaintiff counters that, because of 50

U.S.C. App. § 525, his second period of military service should not be included in computing the two year period. That statute provides in relevant part:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by . . . any person in military service. . ., whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . ."

If the second period of service is disregarded, the two years did not expire until April 25, 1977, which would imply that the administrative claim was timely filed.

The government argues that 50 U.S.C. App. § 525 does not affect the two year period of 28 U.S.C. § 2401 because that is period "jurisdictional". It is true that § 2401 is different from a statute of limitations because it creates the right of action in tort against the United States, with the time limit being an indispensable condition of that right of action. Thus provisions of state law which might toll a statute of limitations during periods of infancy, incompetency or other disability do not apply to it. *Childers v. United States*, 422 F.2d 1299 (5 Cir. 1971). Here, however, we are presented with an act of Congress, which can toll any time period it has enacted, whether that period is characterized as peremptive or

as a statute of limitations. The question presented is whether the language of § 525 is expansive enough to apply to § 2401.

§ 525 tolls "any period now or hereafter to be limited by any law. . . for the bringing of any action or proceeding . . ." That language is as broad as Congress could make it. Admittedly the statute is silent about peremptive periods, but in view of its remedial purpose, which is to protect the legal rights of servicemen while they are in the military, there is every reason to conclude that the statute is intended to cover peremptive periods as well as ordinary periods of limitation. Although precedent is sparse, several courts have applied § 525 to peremptive periods. *Clark v. Mechanics' American National Bank,* 282 Fed. 589 (8 Cir. 1922) (state law lien whose limitations period was characterized as jurisdictional was tolled by § 525), *Berry v. United States,* 126 F.Supp. 190 (Ct. Cl. 1954) (six year peremptive period of 28 U.S.C. § 2501, which establishes the jurisdiction of the Court of Claims, was tolled by § 525). In short, § 525 applies to all statutes restricting the time within which legal proceedings must be commenced, and in particular, it applies to the two year period set out in 28 U.S.C. § 2401.

In the alternative, the government asserts that even if § 525 did toll the filing period in this case, part of the illegal detention claim has still perempted. That claim encompasses the period from September 19, 1974 to November 15, 1974. The government argues that each day of illegal detention constitutes a separate tort and that any claim for deten-

tion occurring prior to October 28, 1974 is time barred, even if the second period of military service is taken into account. This argument misconceives the nature of plaintiff's claim. The alleged illegal detention was continuous. At any given moment between September 19, 1974 and November 15, 1974 plaintiff was being detained illegally by the Marine Corps. The government wants to divide the period of detention into days; it could as easily be divided into weeks or hours or minutes. Since the alleged tort is continuous, the two year peremptive period of 28 U.S.C. § 2401 began to run only when the alleged period of detention ended. Therefore, this alternative argument also fails. Accordingly,

IT IS ORDERED that the Motion to Dismiss brought by the United States is DENIED.

/S/ MOREY L. SEAR
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

C. JUDGMENT DISMISSING PETITIONER'S COMPLAINT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROBERT A. GARRETT	CIVIL ACTION
VS	NO. 79-781
UNITED STATES OF AMERICA	SECTION "G"

JUDGMENT

The Court having on January 16, 1980, granted the defendant's motion to dismiss;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, United States of America and against plaintiff, Robert A. Garrett, dismissing plaintiff's suit at his cost.

Dated at New Orleans, Louisiana, this 17th day of January, 1980.

/S/ NELSON B. JONES, CLERK
NELSON B. JONES, CLERK

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

D. MARINE CORPS SEPARATION AND RETIREMENT MANUAL

CHAPTER 6

DISCHARGING OF ENLISTED PERSONNEL

6001. GENERAL

1. The Marine Corps has the right, obligation, and duty to separate from the service, with an appropriately characterized discharge certificate, members who are entitled to or who have earned discharge, and members who clearly demonstrate that they are unqualified for retention. At the same time, such members have rights which shall be protected.

2. All discharges and separations of enlisted Marines will be governed by and effected in accordance with the provisions of this chapter, which is applicable to all enlisted and inducted personnel of the Marine Corps and Reserve components thereof.

3. All commands shall establish appropriate procedures to ensure that each member receives periodic explanations and separation counseling as follows:

a. *Periodic Explanations.* The various types of discharge certificates; the basis for their issuance; their possible effect upon the member's reenlistment, veterans' benefits, future civilian employment, and other situations in civilian life wherein the nature of service rendered in, or the character of separation from, the Armed Forces may have a bearing will be fully explained to each member at each time the articles of the Uniform Code of Military Justice (UCMJ) are explained, pursuant to article 137 thereof. The fact that this explanation has been given will be recorded on page 11 of the member's service record book as part of the entry required for recording the explanation of articles of the UCMJ. Failure on the part of the member to receive or to understand such explanation may be considered by an administrative discharge board and by a discharge authority, along with all other factors in the case, in determining whether or not a discharge is appropriate, and if so, the type and character of discharge to be awarded. However, in no event shall the failure of the member to receive or to understand such explanation be considered a defense in an administrative discharge proceeding or a bar thereto.

b. *Separation Counseling.* The purpose and scope of the Navy Discharge Review Board and the Board for Correction of Naval Records will be explained at the time the notice of intent is given any member, whether or not he/she is under military control, being discharged with other than an honorable discharge. The contents of subparagraphs 6001.6, 6001.7, 6001.8, and 6001.9 may be used for this purpose.

4. As used in this chapter, the term "continental United States" means the United States, except Alaska and Hawaii, unless otherwise indicated.

5. As used within this chapter, the following definitions will apply:

a. *Discharge.* Complete severance from all military status.

b. *Release from Active Duty.* Termination of active duty status and transfer or reversion to a Reserve component not on active duty.

c. *Separation.* A general term which includes discharge and release from active duty. This definition is broader than the definition of the word "separation" used in Marine Corps Manual, subparagraph 1900.1a.

d. *Administrative Separation.* Discharge or release from active duty upon expiration of enlistment, period of induction, or other required period of service, or prior thereto, in the manner prescribed herein, by law, by the Secretary of Defense, or by the Secretary of the Navy, but specifically exluding punitive separation by the sentence of a general or special court-martial.